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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 244

JOHN CZEPIL,

Petitioner,

—v.—

CURTIS W. TARR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL AND REPLY MEMORANDUM OF PETITIONER

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This memorandum is submitted principally for the purpose of alerting this Court to the fact that a recent decision of the United States Court of Appeals for the Sixth Circuit has created an irreconcilable conflict among the circuits on the only issue raised in the petition. Also, since the filing of the petition in this case several district court decisions have been handed down directly conflicting with the decision of the court below in the case at bar, and a decision by the Court of Appeals for the Fourth Circuit strongly suggests that another court of appeals disagrees with the court below. Moreover, some of the contentions in the Government's Memorandum in Opposition are so meritless that a brief reply is considered appropriate.

United States v. Cabbage

In *United States v. Cabbage*, —— F.2d ——, 3 SSLR 7 No. 19775 (6th Cir. July 31, 1970), the court held that the requirement in 32 C.F.R. 1604.52(c) that members of local draft boards must "if at all practicable, be residents of the area in which their local board has jurisdiction" is mandatory, and not simply directory. The Sixth Circuit reversed the conviction of the defendant in *Cabbage* on other grounds, but in so doing it also held that the defendant could not be subject to reclassification by his local board until it was reconstituted to comply with the regulation.[1]

The court said with regard to the residency requirements:

> "We find it intolerable, however, to send appellant back for reclassification by a board which the United States government has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service system by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violation of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated." *Cabbage*, slip opinion, p. 9.

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[1] The discussion of *Cabbage* in the Government's brief, footnote 4, pages 4 and 5, is, at best, misleading. The Government says that the Sixth Circuit declined to set aside the induction order on account of the composition of the board, and that the court only "urged" that the board be reconstituted. In fact, the Court granted declaratory relief to the effect that the board was improperly constituted and that no action could be taken against Cabbage until it was reconstituted.

The effect of this decision is to create a clear conflict among the circuits, resolvable only by this Court, on the question of whether the residency requirements in §1604.52 (c) of the regulations are mandatory.

United States* v. *Bowen

Further support for the mandatory interpretation of §1604.52(c) is found in *United States* v. *Bowen*, 421 F.2d 193, 196 (4th Cir. 1970), where the court held that in a prosecution for refusal to submit to induction the residence of local board members was a material issue within the context of the criminal discovery rule, Rule 16 of the Federal Rules of Criminal Procedure. See also *Martin* v. *Neuschel*, 1 SSLR 3002 (E.D. Pa. Feb. 13, 1968), rev'd on other grounds, —— F.2d ——.

District Court Cases

Several recent district court decisions have held that the residency requirements for local board members under §1604.52(c) are mandatory and that a draft board which is improperly constituted, in violation of such regulation, is without jurisdiction to classify and otherwise deal with Selective Service registrants. *United States* v. *Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969); *United States* v. *Brock*, —— F. Supp. ——, 3 SSLR 3125 (N.D. Cal. February 26, 1970); *United States* v. *Clinton*, —— F. Supp. ——, Crim. No. 31857 (E.D. La. April 21, 1970).[2]

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[2] *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969) relied upon by the Government, p. 3, fn. 3, Memorandum in Opposition, has been reversed on other grounds by the Ninth Circuit, and, in view of the reversal, and later decisions, is no longer persuasive authority for the government's position.

In view of the growing conflict among circuit and district courts on this question, it is urgent that this Court grant certiorari to resolve this significant question of Selective Service law.

De Facto Board

The Government's argument, that the acts of a *de facto* draft board may not be collaterally attacked, would not be applicable in the case at bar even if it were applicable to Selective Service cases generally. The suit at bar is a direct attack on the legitimacy of the constitution of Local Board 44. Petitioner in the case at bar seeks mandamus directing that the local board be reconstituted, and declaratory as well as injunctive relief in connection with such mandamus. The doctrine of *de facto* political authority relied upon by the Government at pages 4 and 5 of its brief is therefore inapplicable. Each of the cases cited by the Government deals with a collateral attack upon the acts of a *de facto* political entity. In none of the Government's cases did the party seek mandamus reconstituting an improperly composed local draft board.

Petitioner, however, cannot accept the Government's argument that the *de facto* board doctrine applies to an improperly constituted draft board. The decided weight of current authority indicates that a draft board which is improperly constituted under § 1604.52(c) is without jurisdiction to act, and that its actions may be collaterally attacked. *United States* v. *Lemke*, 310 F. Supp. 1298, 1301-1302 (N.D. Cal. 1969);[3] *United States* v. *Beltran*, 306

[3] The government's *de facto* argument rests heavily upon *Ex Parte Wayd*, 173 U.S. 452 (1889). The scholarly opinion of Judge Peckham in *Lemke* demolishes this reliance, and demonstrates the inapplicability of the *de facto* doctrine to Selective Service local boards.

F. Supp. 385, 388-389 (N.D. Cal. 1969); *United States* v. *Machado*, 306 F. Supp. 995, 999-1000 (N.D. Cal. 1969).

Under the Government's *de facto* argument a local board could violate a variety of regulations concerning eligibility for membership and still retain jurisdiction. For example, the Government would hold the acts of a local board legal even if the members were not citizens of the United States, residents of the county within the local board area, or were members of the armed forces or reserve components, or less than 30 years of age, or more than 75 years of age, 32 C.F.R. §1604.52. And the Government would logically have to apply the *de facto* doctrine to local boards in which a member was a first cousin or closer relationship by blood, marriage or adoption, or a subordinate in employment, or a partner or business associate of a registrant, or had some other disqualifying relationship to a registrant with whom it was dealing (32 C.F.R. §1604.55). This partial list should reveal the futility and absurdity of attempting to apply the *de facto* doctrine to Selective Service local boards.

Scope of Mandamus

The Government's attempt[4] to narrow the scope of mandamus relief is countered by extensive recent authority to the effect that mandamus is a remedy available to Selective Service registrants who are the victims of "regulatory lawlessness" by local boards. *Murray* v. *Vaughn*, 300 F. Supp. 688, 707 (D.R.I. 1969); *Turley* v. *Selective Service Local Board No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252, 254-55 (D. Conn. 1969), aff'd 412 F.2d 71 (2d Cir. 1969); *Foley* v. *Hershey*, 409 F.2d 827 (7th Cir. 1969); see Byse & Fiocca, Section 1361 of the Mandamus and Venue

[4] Pages 6 and 7, Memorandum in Opposition.

Act of 1962 and Nonstatutory Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967).

Proper Parties

The Government's contention that the defendants at bar are not the proper parties is thoroughly specious. The President has delegated his power to appoint members of local boards to the National Director of Selective Service. E.O. 8569, 3 C.F.R. 797 (1938-43 compilation), October 17, 1940; Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 17 (1967) (The Marshall Commission); *The Selective Service*, 76 YALE L.J. 160, 167 (1966). In addition, the National Director of Selective Service has plenary power to remove members of local boards without cause. 32 C.F.R. §1603.6(a) (1970). Obviously the National Director of Selective Service is the proper party to be sued for reconstitution of the local boards. Moreover, even the Governor's power of appointment is delegated to the State Director of Selective Service. See 32 C.F.R. §1604.11 (1970); Davis and Dolbeare, LITTLE GROUPS OF NEIGHBORS; THE SELECTIVE SERVICE SYSTEM, 66-67 (1968).

Pre-Induction Judicial Review

Contrary to the Government's argument, judicial review is clearly proper here where the question involved is whether the Selective Service System is complying with its own regulations, and not where the board's discretionary fact finding powers are under review. *Crane* v. *Hershey*, 410 F.2d 966 (1st Cir. 1969); *Bucher* v. *Selective Service System*, 421 F.2d 24, 27-29 (3d Cir. 1970); *National Student Association* v. *Hershey*, 412 F.2d 1103,

1107-09 (D.C. Cir. 1969); *Barker v. Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Murray v. Blatchford*, 307 F. Supp. 1038, 1057-58 (D.R.I. 1969); *Wiener v. Local Board No. 4*, 302 F. Supp. 266, 269 (D. Del. 1969); see *Shea v. Mitchell*, 421 F.2d 1161, 1165-66 (D.C. Cir. 1970).

CONCLUSION

The contention that a decision of this Court requiring the Selective Service System to comply with its own regulations will disrupt the system is tired and discredited. This Court should not "take such a dire view of the likely consequences" of a decision that the system must obey the law. *McKart v. United States*, 395 U.S. 185, 199-200 (1969); *Toussie v. United States*, 397 U.S. 112, 25 L.Ed.2d 156, 166 (1970).

Respectfully submitted,

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